

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

No. CR 04-1915 JB

SAUL JAVIER SALDIVAR-PERALES,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Defendant's Objection to Presentence Report, filed December 12, 2004 (Doc. 15). At the sentencing hearing, counsel for the Defendant, after reviewing the United States' response, withdrew any objection to the Presentence Report ("PSR") offense level and criminal history calculations. The Court will therefore overrule Defendant Saldivar-Perales' objection.

BACKGROUND

On or about June 15, 1984, Saldivar-Perales was convicted in El Paso, Texas of the crime of burglary of a habitation. The Texas state court sentenced Saldivar-Perales to ten years probation, which was discharged on June 10, 1994.

Burglary of a habitation constitutes a crime of violence under the commentary to United States Sentencing Guidelines (U.S.S.G.) § 2L1.2. See U.S.S.G. § 2L1.2 cmt. (B)(iii). Accordingly, the PSR contains a 16-point increase under U.S.S.G. § 2L1.2(b)(1)(A) for Saldivar-Perales' prior conviction.

Because of the age of and the lack of information on the burglary of a habitation conviction,

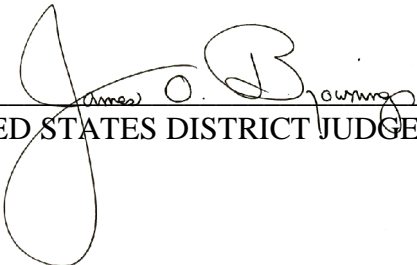
Saldivar-Perales objects to the 16-point offense level increase as unjust and inappropriate.

ANALYSIS

At the sentencing hearing, Saldivar-Perales' counsel, Roberto Albertorio, having reviewed the United States' response to his objection, withdrew his objection to the PSR's offense level and criminal history calculation. Because there is no longer any dispute about the accuracy of the PSR's calculations under the Sentencing Guidelines, the Court will overrule Saldivar-Perales' objection.

Mr. Albertorio, however, clarified at the hearing that he was requesting that the Court not follow the guidelines applications in light of the Supreme Court for the United States recent decision, United States v. Booker, 2005 W.L. 50108, 543 U.S. ____ (2005). The Court, in fashioning Saldivar-Perales' sentence, will therefore treat the objection as a sentencing memorandum, and will overrule his objection to the PSR.

IT IS ORDERED that Defendant Saul Javier Saldivar-Perales' objection is overruled and the Court will treat his object as a sentencing memorandum seeking a variation or deviation from the Guideline sentence.


UNITED STATES DISTRICT JUDGE

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